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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT DAILY, III,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 47A01-0510-CR-455
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable Michael A. Robbins, Judge
Cause No. 47D01-0409-FC-476

September 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Robert Daily, III appeals his conviction and sentence for burglary, as a class B felony.¹

We affirm.

ISSUES

1. Whether the trial court erred in denying Daily's motion for a directed verdict.
2. Whether the trial court erred in sentencing Daily.

FACTS

In the evening of August 12, 2004, Daily, Michael Griffie and Andrew Carter drove sixteen-year-old Heather Daugherty to her home from a skate park in Bedford so that she could change her clothes. Daily, Griffie and Carter waited in the Daugherty's living room while Heather changed her clothes in another room. A gun rack, holding several shotguns, was hanging in the living room. The living room led directly into the master bedroom, in which there was a safe. The safe was visible from the living room.

While Heather and the men were at the Daugherty residence, Heather's sister, Chelsea, arrived home with their two-year-old sister, Emily. Chelsea informed Heather that she would have to pick up their mother, Cathy, from work. Heather, Daily, Griffie and Carter then left the residence. The three men dropped Heather off at the skate park, where she stayed until late in the evening.

¹ Ind. Code § 35-43-2-1.

Chelsea left her residence at roughly 9:15 p.m. to pick up her mother from work, taking Emily with her. Upon her arrival home approximately half an hour later, Cathy noticed that the gun rack was broken and three shotguns were missing. She also noticed that the safe and its contents, which included several handguns and jewelry, were missing. Cathy telephoned the police and reported the burglary. Michael Daugherty, Cathy's then-husband, who was not living at the residence at the time, later reported that a fanny pack filled with ammunition also was missing.

Detective Kevin Jones, with the Bedford Police Department, investigated the burglary of the Daugherty residence. On August 18, 2004, after taking Heather's statement, Detective Jones located Carter and had Carter come to the police station to discuss the burglary. Carter admitted to Detective Jones that he had been involved in the burglary and told Detective Jones where the safe and its door had been disposed. Detective Jones later located the safe's door, where Carter said it would be. The safe itself, however, was never recovered since, according to Carter, it was "[i]n Empire Quarry, in the hole itself." (Tr. 175).

Carter also informed Detective Jones that he "could find handguns in a backpack in the Miami Fort Park which is in Peru, Indiana." (Tr. 179). Carter directed Detective Jones that "if [he] pulled into the main, through the main drive into that parking lot there'd be a little deck type area that had a bench on it and they were stuffed underneath that deck." (Tr. 179). Carter told Detective Jones that the backpack contained "two handguns, a Ruger and a three fifty-seven, [and] IDs for Robert Daily." (Tr. 179-80). Detective Jones advised the Peru Police Department of the backpack's location, and

Officer Mike Stuber from the Peru Police Department later located the backpack and its contents, as described by Carter: two guns, Daily's bank card and Daily's Indiana identification card. The backpack also contained a pawn ticket, a fanny pack containing ammunition and a sex toy. Detective Jones had the guns dusted for fingerprints, but "there were no identifiable prints on those guns." (Tr. 209).

Carter also gave detailed directions to where other guns taken from the Daugherty residence were located and a description of the car in which the guns were left. Officers were unable to locate the guns, although they did find a vehicle matching Carter's description.

On September 1, 2004, the Lawrence Superior Court found probable cause to arrest Daily for burglary, as a class C felony, and issued an arrest warrant for Daily. Carter, Griffie and Daily were arrested on September 7, 2004, September 11, 2004 and December 2, 2004, respectively. On August 17, 2005, the State filed an amended information against Daily, charging him with burglary, as a class B felony.

Carter entered into a plea agreement with the State under which he pled guilty to burglary, as a class C felony. The State tried Daily before a jury on August 23, 24 and 25, 2005. Carter testified at the trial. On August 25, 2005, the jury found Daily guilty as charged.

The trial court ordered a pre-sentence investigation report ("PSI"). According to the PSI, Daily was adjudicated a juvenile delinquent in 1991 for having committed an act that would constitute burglary, as a class B felony, if committed by an adult. The PSI further showed convictions as an adult in 1993 for conversion, a class A misdemeanor,

and burglary, as a class C felony. Also according to the PSI, Daily violated his probation in 1994 and his parole in 1999. Following a sentencing hearing on September 21, 2005, the trial court sentenced Daily to an enhanced sentence of sixteen years, with six years suspended, and placed Daily on supervised probation for three years to be followed by three years of unsupervised probation. Additional facts will follow.

DECISION

1. Directed Verdict

Daily contends that the trial court erred in denying his motion for a directed verdict at trial, following the State's case-in-chief. Specifically, Daily argues that "the State failed to present sufficient evidence of the elements of the burglary." Daily's Br. 7.

The denial of a motion for a directed verdict cannot be in error if the evidence is sufficient to support a conviction on appeal. Huber v. State, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). Our standard of review for sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the credibility of witnesses. Snyder v. State, 655 N.E.2d 1238, 1240 (Ind. Ct. App. 1995). We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom, and if there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. We will sustain a judgment based on circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt. Altes v. State, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), trans. denied.

Daily asserts the "incredible dubiousity" rule should apply in his case because his conviction was based on Carter's testimony, which he characterizes as "inherently

improbable and coerced by his desire to get even with Daily and his lenient plea agreement.” Daily’s Br. 8. “Under the incredible dubiousity rule, a court will impinge on the jury’s responsibility to judge the credibility of the witness only when it is confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” Id. at 1122. We will reverse a conviction where a “sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence” Id. The application of the “incredible dubiousity” rule is rare “and is limited to cases where the sole witness’ testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.” Id.

Although an accomplice’s testimony is subject to high scrutiny, such testimony is by itself sufficient to sustain a conviction. Herron v. State, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), trans. denied. “The fact that the accomplice may not be completely trustworthy goes to the weight and credibility of his testimony, something that is completely within the province of the jury and cannot be reviewed on appeal.” Id.

In this case, Carter testified that after he, Daily and Griffie dropped Heather off at the skate park, they returned to the Daugherty residence. They circled around the block until Chelsea and Emily left the house. Carter further testified that while waiting for Chelsea and Emily to leave, he and Griffie made plans to “grab the safe and [Daily] was going to look for something else to grab.” (Tr. 343). After Chelsea and Emily left the house, he, Daily and Griffie entered the house. Carter testified that he and Griffie “[g]rabbed the safe” and “put it in the back seat,” while Daily remained in the house. (Tr. 344). Carter testified that the safe was heavy and he could not have carried it without

assistance. Carter testified that “[o]nce the safe was in the back seat Rob came out,” carrying “something long” with “a blanket wrapped around it.” (Tr. 345). Carter put the item Daily took from the house into the trunk of his vehicle. Carter further testified that the three men then drove to Empire Quarry, where they pried the door off of the safe with a pry bar. Carter testified that after putting the safe’s contents in backpacks, Daily dumped the safe in the quarry, and the door “was thrown into a ditch” (Tr. 346).

Regarding the handguns, Carter testified that two of the handguns “were left in one of the backpacks.” (Tr. 348). Carter also testified that he knew that Daily’s identification was in the backpack because “[Daily] kept forgetting where he put [his identification] so he made it a point to tell [Griffie and Carter] that they were inside the backpack in case he needed them.” (Tr. 349). Carter testified that he later hid Daily’s backpack under a deck in Miami Fort Park.

Daily characterizes Carter’s testimony regarding Daily throwing the safe into the quarry as “inherently improbable” because “while several witnesses testified that the Daugherty’s [sic] safe could not be lifted by one person[,] Carter testified that Daily picked it up himself and threw it in the quarry.” Daily’s Br. 9 (internal citations omitted). Daily also characterizes Carter’s testimony regarding the handguns in Daily’s backpack as “inherently improbable” because “were Carter and Daily truly joint actors in the burglary, Carter would not have left Daily’s identification with the handguns because such evidence would likely have led directly back to Carter.” Daily’s Br. 9.

The “incredible dubiousity” rule does not apply because Carter’s testimony was not inherently contradictory and because there was circumstantial evidence of Daily’s guilt.

Furthermore, we cannot characterize as “improbable” Carter’s testimony regarding Daily throwing the safe, which was empty of its contents and missing its door, into the quarry because his testimony was not inherently contradictory where Carter testified that he could not have carried the safe and its contents by himself, and Michael Daugherty testified that he could not have moved the safe and its contents, which included approximately “twelve, fifteen” handguns and possibly the fanny pack full of ammunition, without help. (Tr. 257). We also cannot say that Carter’s testimony regarding hiding the backpack with the handguns and Daily’s identification in it was so improbable no reasonable person could believe it.

Daily further characterizes Carter’s testimony as “inherently unreliable,” because Carter ostensibly wanted revenge for a fight he had with Daily and was motivated by a plea agreement. Daily’s Br. 10. We cannot say, however, that Carter’s testimony was coerced, equivocal or wholly uncorroborated. Additionally, Daily is asking this Court to reweigh the evidence and judge Carter’s credibility, which we will not do.

Carter’s testimony is neither “incredibly dubious,” nor is the evidence insufficient to support Daily’s conviction. Because we find the evidence sufficient to support Daily’s conviction, we find that the trial court did not err in denying Daily’s motion for a directed verdict.

2. Sentence

Daily contends that the trial court erroneously sentenced him to an enhanced sentence of sixteen years² based upon its findings of the following aggravating circumstances: 1) Daily had a criminal history, 2) Daily had violated probation in the past, 3) Daily violated his position of trust, and 4) correctional or rehabilitative treatment would be provided best by commitment to a penal facility. Specifically, Daily argues that, with the exception of his criminal history, the aggravating circumstances were not properly found under the standards set forth in Blakely v. Washington, 542 U.S. 296 (2004) because they were neither admitted by Daily nor found by a jury.

A single circumstance may be sufficient to support an enhanced sentence. Edwards v. State, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). In this case, the trial court properly considered Daily's criminal history, which included a juvenile adjudication for burglary and a conviction as an adult for burglary. Given the nature of these offenses as they relate to the current offense, we find this aggravating circumstance alone supports Daily's enhanced sentence. Accordingly, we decline to disturb Daily's sentence.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

² The statutory sentencing range for a class B felony is six to twenty years, with the presumptive sentence being a fixed term of ten years with not more than ten years added for aggravating circumstances. Ind. Code § 35-50-2-5. Subsequent to the date of Daily's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-5 to provide for an "advisory" rather than a "presumptive" sentence. See P.L. 71-2005, § 7 (eff. Apr. 25, 2005). We agree with Patterson v. State, 846 N.E.2d 723 (Ind. Ct. App. 2006) and Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006), trans. denied, which held that the change from presumptive to advisory sentences should not be applied retroactively because the change is substantive, not procedural.